BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTO M. GARCIA	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,560
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the preliminary hearing order of Administrative Law Judge Kenneth S. Johnson dated November 12, 1997, wherein the Administrative Law Judge denied claimant benefits finding that claimant had willfully failed to use a guard or protection voluntarily provided by respondent in violation of K.S.A. 1996 Supp. 44-501(d).

ISSUES

Whether the claimant violated K.S.A. 1996 Supp. 44-501(d) and K.A.R. 51-20-1 in failing to use a guard or protection provided voluntarily by respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant had been a foreman for respondent for approximately one month when on January 8, 1997, he was injured when a chemical, chlorinated cip cleaner fluid No. 0010, splashed onto his face and into his eyes. At the time claimant was wearing a protective smock, protective boots, and protective eyeglasses but was not wearing the additional protective face shield, chemical apron, or chemical mask as was required by respondent's safety policy. Claimant acknowledges he had been trained in the use of safety equipment and agrees that he was not using the appropriate safety equipment on the date of the accident.

At the time of the accident the claimant was running a fork lift and cleaning product off of the floor. He was called by the chemical operator to assist in obtaining chemicals from a 55-gallon barrel. Normally the chemical would be obtained through the use of an air pump but on this occasion the air pump was not functioning. In addition, the chemical, which was normally a liquid, was semi-frozen because the heater used to warm the chemicals was also broken, reducing the chemical to a semi-frozen sludge. While claimant was assisting the operator to turn the barrel on its side and pour chemical from the barrel into a bucket, the chemical splashed onto his face and eyes causing damage and forcing respondent to transfer claimant to the emergency room of the hospital where claimant was admitted for treatment. Claimant was off work for approximately two weeks, returning to work on January 23, 1997, and continued to work for the respondent as of the preliminary hearing.

Respondent contends claimant's handling of the chemicals without the appropriate equipment is a violation of K.S.A. 1996 Supp. 44-501(d) which states in part:

> "If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed."

Claimant cites K.A.R. 51-20-1 which states:

> "The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation."

While K.A.R. 51-20-1 is cited, the evidence is not convincing that respondent has disregarded the rules of safety. In fact, the evidence indicates that the claimant had been trained to wear the appropriate safety equipment. The operator on duty was wearing the appropriate safety equipment and suffered no injury from the incident. Therefore, the Appeals Board finds K.A.R. 51-20-1 does not apply to this circumstance.

However, the burden placed upon respondent by the Kansas Supreme Court with regard to K.S.A.1996 Supp. 44-501(d) is substantial. The Kansas Supreme Court in Bersch v. Morris & Co., 106 Kan. 800, 804, 189 Pac. 934 (1920), and the Court of Appeals in a more recent decision in Carter v. Koch Engineering, 12 Kan. App. 2d 74, 735 P.2d 247 (1987), *rev. denied* 241 Kan. 838 (1987), have defined the term willful to include:

> ". . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' (Webster's New International Dictionary.)"

In this instance, claimant was performing his job duties on a fork lift when he was called upon by an operator to assist in the moving of a barrel of semi-frozen liquid. This incident would not have occurred had the heater normally used to keep the chemical warm been in operation or had the air pump normally used to transfer the chemical been working. However, neither of these features were in operation. The spontaneous request by the operator, with a likewise spontaneous response by the claimant, does not render this activity "willful" under the definition set forth above. The Board finds the actions by claimant were not "willful" as the term is defined by the Kansas Appellate Courts. Therefore, it is the decision of the Appeals Board that the Order of Administrative Law Judge Kenneth S. Johnson denying claimant benefits should be, and is hereby, reversed.

The evidence is uncontradicted that claimant was off work from January 9 through January 22, 1997, a period of two weeks. K.S.A. 44-510c(b)(1) restricts the payment of temporary total disability compensation during the first week of disability unless temporary total disability compensation exists for three consecutive weeks. In this instance, claimant's temporary disability existed for only two weeks and, thus, claimant is not eligible for the first week of compensation. Claimant is, therefore, awarded one week of temporary total disability compensation at the rate of $338 per week. The temporary total disability rate was computed from claimant's average weekly wage pursuant to respondent's Exhibit 5 attached to the preliminary hearing.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth S. Johnson dated November 12, 1997, should be, and is hereby, reversed and claimant is granted one week of temporary total disability compensation at the rate of $338 per week in the amount of $338 for the injury suffered on January 8, 1997. In addition, respondent is liable for the medical expenses incurred, including any surgical or hospital treatment which may be reasonably necessary to cure and relieve the employee from the effects of the injury of January 8, 1997.

IT IS SO ORDERED.

Dated this _____ day of January 1998.

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Kerry E. McQueen, Liberal, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director